UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EUGENE HASENFUS, an individual and SALLY HASENFUS, an individual, *Plaintiffs,* vs. RICHARD SECORD, an individual, and SOUTHERN AIR TRANSPORT, INC., a Florida Corporation, *Defendants.*	Case No. 88-1841-CIV-ATKINS
KASANEE SAWYER, an individual, and KASANEE SAWYER, Administratrix of WALLACE B. SAWYER, Deceased, *Plaintiffs,* vs. RICHARD SECORD, an individual, and SOUTHERN AIR TRANSPORT, INC., a Florida Corporation, *Defendants.*	Case No. 88-1850-CIV-ATKINS

ORDER DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL

THIS CAUSE is before the Court on Plaintiffs' Motion for a New Trial. After careful consideration of all the pleadings and the relevant law, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion for a New Trial is hereby DENIED.

I.
INTRODUCTION

This case arose out of the covert attempt to supply arms to the so-called Contra forces in Nicaragua. The facts and general backdrop of the case are set forth in prior court orders, and the familiarity with those facts is presumed. *See* Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion to Dismiss (March 29, 1989) ("Order on Motion to Dismiss"), at 2-4; Order Denying Defendant Richard Secord's Motion to Dismiss Plaintiff's Amended Complaint (May 3, 1990) ("Order on Motion to Dismiss"), at 1-3; Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion for Summary Judgment (July 24, 1990) ("Order on Motions for Summary Judgment"), at 1-4; Order Granting in Part and Denying in Part Defendants' Motion for Directed Verdict (September 10, 1990) ("Order Granting In Part And Denying In Part Defendants' Motion for Directed Verdict"), at 2-4.

This case was tried to a jury during the latter part of August, 1990. At trial, the parties proceeded under two vicarious liability theories: joint venture and agency.[1] The Hasenfuses', through their Third Amended Complaint, sought damages from all the defendants based on the following theories: (1) breach of written and oral contract; (2) breach of intentional and/or negligent misrepresentation; and (3) conversion. Likewise, the Sawyers' Third Amended Complaint

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[1] This court's order file-stamped July 24, 1990 granted SAT's motion for summary judgment to the extent that plaintiffs were not permitted to impose liability against the defendants on the alter ego or the civil conspiracy theories.

charged the defendants with: (1) breach of contract; (2) negligence; (3) intentional and/or negligent misrepresentation; and (4) wrongful death based on the above counts.

At the close of all the evidence and after hearing arguments on the motion, this court granted in part and denied in part defendants' motion for directed verdict.[2] The motion for directed verdict was granted in regard to Hasenfuses' claim for conversion. As to the Sawyers' Third Amended Complaint, the motion for directed verdict was granted in regard to Sawyers' claim for negligence, intentional misrepresentation, negligent misrepresentation and the wrongful death claim which was based on the above causes of action. The jury found for plaintiffs on their vicarious liability theories of joint venture and agency, but ruled in favor of defendants on all other claims. A judgment and jury verdict were entered in favor of defendants. This motion for a new trial followed.

II.
DISCUSSION

A. *General Principles Applicable to Fed. R. Civ. P. 59*

The crux of the plaintiffs' post-trial motion is that this court erred in granting in part and denying in part defendants' motion for a directed verdict on the negligence and misrepresentation claims and further gave erroneous instructions and special verdicts which entitle them to a new trial. Before examining each allegation it would do well to delineate the overarching principles against which the allegations must be assessed.

New trials are granted to prevent miscarriages of justice or to correct manifest errors of law or fact. *See, e.g., Fund of*

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[2] The Court announced its determinations on the motion for directed verdict to all parties in open court on August 17, 1990, at the close of all the evidence. On September 10, 1990, the Court supplemented the record with a written order on the motion.

Funds, Ltd. v. Arthur Anderson & Co., 545 F. Supp. 1314, 1326 (S.D.N.Y. 1982) (prevent miscarriage of justice or erroneous verdict); *Adams v. James*, 526 F. Supp. 80, 86 (M.D. Ala. 1981) (correct manifest errors). New trials are not, however, intended to afford the defeated party a vehicle through which he or she may relitigate decided issues. *See Adams*, 526 F. Supp. at 86 (cannot relitigate old matters); *see also Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986) (analogous motion to amend findings should not be used "to advance new theories, or to secure a rehearing on the merits").

In regard to jury verdicts, a trial court may grant a motion for a new trial if it believes that the verdict was contrary to the great weight of the evidence. *Rosenfield v Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1497-98 (11th Cir. 1987) (citing *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982)). Although this court may properly weigh the evidence supporting the verdict, *Rosenfield*, 827 F.2d at 1498 (citing *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982)), it must find the verdict was contrary to the great and not the greater weight of the evidence. *Rosenfield*, 827 F.2d at 1498 (citing *Williams*, 689 F.2d at 973)). This court must view the evidence favoring the verdict as well as that in favor of the moving party, but should not substitute its credibility determinations or inferences for those of the jury. *Rosenfield*, 827 F.2d at 1498 (citing *Williams*, 689 F.2d at 973-74 n.7). The court, therefore, reviews the plaintiffs' motion with these principles in mind.

B. *Application To Each Alleged Prejudicial Error*

Plaintiffs claim that this Court committed prejudicial error on various points decided below. We address each claim separately.

(1) Negligence

Plaintiffs first assert that this Court committed error in directing a verdict for defendants on issues of negligence.[3] Under Florida law, the elements of actionable negligence are:

> (1) a legal duty owed by defendants to plaintiff;
>
> (2) breach of the duty; and
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> (3) injury sustained as a proximate result of the breach.

Hensley v. U.S., 728 F. Supp. 716, 721 (S.D. Fla. 1989) (applying Florida law on negligence) (citations omitted). "To establish proximate cause under Florida law, plaintiffs must show that the defendant's alleged wrong caused the damage complained of." *Id.* at 722 (citations omitted). The sequence of events between the negligent act and the injury must be natural, direct and continuous that it can reasonably be said that but for the act the injury would not have occurred. *Id.* (citations omitted). Therefore, an essential element to proximate cause is causation in fact or the "but for" test. *Id.* (citing *Sardell v. Malanio*, 202 So.2d 746, 747 (Fla. 1967)).

In our previous order on the directed verdict motion, we reasoned that after viewing all the evidence presented in the case in the light most favorable to the plaintiffs, no reasonable

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[3] The only direct claim for Negligence was in Count II of Sawyer's Third Amended Complaint. By granting the motion to conform the evidence to the pleadings, the Court allowed the plaintiffs to proceed on other theories of negligence not asserted in the pleadings. However, the granting of this motion only affected the Hasenfuses' complaint to the extent that any of the claims in the Hasenfuses' Third Amended Complaint were based on factual underpinnings of negligence. At no time during the trial did the court allow the Hasenfuses' to add a separate claim of negligence to their Third Amended Complaint.

juror could find that but for the defendants' alleged negligence[4], the aircraft would not have been shot down. See Order dated September 10, 1990 Granting in Part and Denying in Part Defendants' Motion for Directed Verdict page 12-17. In other words, even assuming that plaintiffs had established negligence on the part of the defendants, they failed to establish that any such negligence was the proximate cause of the tragic airplane crash. *Hensley*, 728 F. Supp. at 723. We stand by this reasoning.

Plaintiffs' motion for a new trial does not directly address the proximate causation element; instead, plaintiffs reargue their various theories of negligence concentrating on the duty and breach elements. The undisputed facts show that the aircraft was hit by an unseen heat-seeking missile on October 5, 1986. The heat-seeking missile was drawn to the flames emitted from the aircraft's engines. The flames emitted from the aircraft were the same whether flying during the day or night. Nothing that the defendants, their agents or anyone acting in a joint venture with defendants did or failed to do caused or contributed to the crash of the aircraft. Thus, the motion for a new trial is denied as to the negligence issue; the Court properly directed a verdict on the negligence theory.

(2) Ultrahazardous Activity Doctrine

Plaintiffs claim that they presented sufficient evidence to warrant a jury determination that the Contra supply mission was an ultrahazardous activity. On March 28, 1989, this Court granted the Defendant's Motion to Dismiss as it related to plaintiffs claim for strict liability in tort based on an ultrahazardous activity. Having reviewed the facts presented at trial and the applicable Florida law, we stand by our earlier ruling. The doctrine of strict liability for ultrahazardous activity has no application to the present case and does not permit

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[4] Negligence here includes all theories that plaintiff conformed to the evidence. Plaintiff raised new theories of negligence at trial which were not directly pleaded in plaintiff Sawyer's Third Amended Complaint.

an employee to hold strictly liable his employer for personal injuries sustained during the course of an employment relationship. See Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion to Dismiss dated March 29, 1989 pages 7-9.

(3) Misrepresentation

The court's order dated September 10, 1990 only directed a verdict on plaintiff Sawyer's claims of misrepresentation, not Hasenfus, claim for misrepresentation. Plaintiff asserts that a new trial on all misrepresentation claims must be granted for all plaintiffs. Sawyer's claims for misrepresentation did not withstand the directed verdict motion at the close of all the evidence and do not now warrant our granting of a new trial. There was no evidence of any knowingly or negligently false statements of material facts upon which Wallace B. Sawyer justifiably relied and which caused his death or other damages. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir. 1983) (applying Florida law on misrepresentation). Surely to allow these claims to go forward without any proof of reliance whatsoever would amount to reversible error; it was not prejudicial error to direct a verdict in regard to Sawyer's claims or misrepresentation.

(4) Special Verdict Forms and the Jury Instructions

Plaintiffs take issue with the special verdict forms and instructions submitted to the jury claiming prejudicial error on various points. Before addressing the alleged errors, it would do well to outline some additional principles in regard to challenges to the propriety of special verdict forms and jury instructions.

"The test employed in determining whether a conflict in the verdict can be reconciled is 'whether the answers may fairly be said to represent a logical and probable decision on the relevant issues submitted . . .' " *Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*,

465 U.S. 1102 (1984) (quoting *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973)). "A special verdict which does not resolve the essential facts, or does so in an inexplicable fashion, will not support a judgment." *Id.* at 1489 (citations omitted).

"The purpose of the jury instructions 'is to give the jury a clear and concise statement of the law applicable to the facts of this case.' " *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1525 (11th Cir. 1985) (quoting *Hanover Fire Insurance Co. v. Sides*, 320 F.2d 437, 444 (5th Cir. 1963)). The charges, considered as a whole, should sufficiently instruct the jury so that the jurors understand the issues involved and are not misled. *Id.* at 1525 (citing *Frosty Land Foods International, Inc. v. Refrigerated Transport Co.*, 613 F.2d 1344, 1348 (5th Cir. 1981)). The law is also well-settled that a "trial court's refusal to give a requested instruction is not error where the substance of that proposed instruction was covered by another instruction which was given." *Id.* (citations omitted).

Plaintiffs first take issue with the Sawyer special verdict form questions two and three which stated as follows:

AGENCY

2. Do you find that William (Bill) Cooper or Corporate Air Services, Ltd., was the agent of the defendants, SAT or Richard Secord, at the time Wallace B. Sawyer signed the written Agreement?

(see the written instruction [sic] on agency)

* * * * *

CLAIM FOR BREACH OF CONTRACT

3. Was there a contract between Wallace B. Sawyer and defendants, Richard Secord or SAT for services to be rendered by Sawyer and benefits to be paid thereunder?

The jury answered question two in the affirmative as to both defendants SAT and Richard Secord. This question directly related to one of plaintiffs' theories of vicarious liability: the agency theory. The jury correctly followed the instructions on the Sawyer special verdict form and went on to answer question three. As to question three, the jury answered in the negative.

Plaintiffs main objection to questions two and three is that when the jury considered question three it improperly focused its attention on the Independent Contractor Agreement Sawyer signed because of the reference to "written Agreement" in question two. They object to question two's reference to "written Agreement" and argue that the purported written Agreement became the point of reference for the jury to evaluate Sawyer's claim for death benefits. Plaintiffs also assert that question three is improper in that it does not mention the agency theory.

The written Independent Contractor Agreement signed only by Wallace B. Sawyer was admitted into evidence pursuant to Federal Rule of Evidence 901. There were no objections to the introduction of the Sawyer written Agreement. The jury's answering of yes as to both defendants for question two, showed only that the jury found that an agency relationship existed at the time that Sawyer signed the written Agreement. Nothing about question three suggested that the "contract" referred to could only be the written Agreement referred to in question two. The jury instructions further support this conclusion. The jury instructions generally refer to a "contract" or "agreement", not to a specific written Agreement. The jury instruction on breach of contract are very clear that a contract can be both oral and written and also that an express provision of a contract can be specifically agreed to by the parties, either orally or in writing. See the Court's Instruction to the Jury pages seventeen through nineteen. Indeed Plaintiffs' counsels' arguments to the jury expressly argued to the jury the existence of oral terms of an agreement to provide death benefits. The use of the term "written Agreement" in Sawyer's Special Verdict Form question two did not constitute prejudicial error.

Plaintiffs next argument is that the failure of question three to refer to an agent of the joint venture is prejudicial error. The courts instruction of Sawyer's claim at page eleven makes clear that any contract, entered into by William Cooper or Corporate Air Services, Ltd. was also between Sawyer and SAT or Secord. The Court made it clear that the jury was to consider the instructions taken as a whole. The Sawyer special verdict form when read in conjunction with the language of the instructions, including the instructions on agency and contract, coupled with all the closing arguments by plaintiffs' counsels', negates any prejudicial error in this regard. The answers to questions two and three on the Sawyer special verdict form fairly represent a logical and probable decision on the relevant issues submitted. *See e.g. Burger King Corp.*, 710 F.2d at 1489. The jury found that an agency relationship existed and went on to consider the existence of a contract. In light of the extensive instructions on all the theories which were correct statements of the law and of plaintiffs claims, it can be fairly said that the essential facts were resolved and there were not inconsistencies or ambiguities. The jury instructions gave the jury a clear and concise statement of the law applicable to the facts of this case and the charges, considered as a whole, sufficiently instructed the jury to so that the jurors understand the issues involved and were not mislead.

Despite the jury's finding in favor of plaintiffs on the agency theory, plaintiffs' motion for a new trial asserts prejudicial error in regard to the court's specific instructions on agency. Specifically, plaintiffs contend that the court's instructions on agency required the jury to find that an agent had to be an "employee" of SAT or Secord to be an agent. Plaintiffs also argue that the jury was precluded from considering the liability of SAT and Secord for the acts of their agents Schofield and Abrams.

The Court's instructions on agency were as follows:

> The second theory of liability upon which the plaintiffs seek to hold the defendants liable is called

the agency theory. To find that the plaintiffs may proceed on this theory, you must determine whether William Cooper or anyone acting for Corporate Air Services, Ltd. was an agent of the defendants and acting within the course and scope of their employment at the time and place of the conduct complained of. An agent is a person who is employed to act for another, and whose actions are controlled by his employer or are subject to his employer's right of control. An employer is responsible for the conduct of his agent if such conduct occurs while the agent is performing services which he was employed to perform or while the agent is acting at least in part because of a desire to serve his employer and is doing something that is reasonably incidental to his employment or something the doing of which was reasonably foreseeable and reasonably to be expected of persons similarly employed.

An agency relationship can also be imposed under apparent authority. You must determine whether William Cooper and anyone acting for Corporate Air Services, Ltd. was an agent of the defendants and acting within the scope of their apparent authority at the time and place of the conduct complained of. William Cooper and anyone acting for Corporate Air Services, Ltd. was an apparent agent if the defendants by their words or conduct caused or allowed Eugene Hasenfus, Sally Hasenfus and/or Wallace B. Sawyer to believe that they were agents of and had authority to act for the defendants and if Eugene Hasenfus, Sally Hasenfus and/or Wallace B. Sawyer justifiably relied upon that belief in dealing with the above named as the agent of the defendants. A person or corporation is responsible for the conduct of his apparent agent occurring while the apparent agent is acting within the scope of his apparent authority.

See Court's Instructions to the Jury pages fourteen through fifteen.

The instructions do not refer to the term "employee." Nor do the instructions relate to any employer-employee relationships. The term "employer" is commonplace in discussions of the relationship of non-servant agents or independent contractors to their principal. *See e.g.*, Keaton, *Prosser and Keaton on Torts*, §§ 70, 71 at 508-510 (5th Ed. 1984); Reuschlein & Gregory, *Agency and Partnership*, § 3 at 8 (1979). Neither the jury instructions nor the special verdict forms required the jury to find that an employee-employer relationship existed. In fact, the jury instructions submitted by plaintiffs included the term "employed" and "employer." Under these circumstances, the use of the words employed, employer or employment in the instructions, if error, was harmless. *Pate v. Seaboard R.R. Inc.*, 819 F.2d 1074 (11th Cir. 1987). The jury was properly guided in its deliberations and a new trial is not justified. *See Houston v. Herring*, 562 F.2d 347, 348-49 (5th Cir. 1977).

Plaintiffs also claim that the agency instructions precluded a finding by the jury that SAT and Secord were liable for the acts of Schofield and Abrams. Plaintiffs contend that the jury should have been instructed more specifically as to plaintiffs' theory that both Schofield and Abrams were allegedly agents of the joint venture or of the defendants. Schofield and Abrams were employed by the State Department and are alleged to have been connected with the covert operation. Notwithstanding defendants hearsay objections to the testimony of Sally Hasenfus regarding the alleged statements of Schofield and Abrams, the plaintiffs were permitted to introduce all the evidence they had on this issue. There simply was no competent evidence from which the jury could reasonably infer that the agency relationships necessary to link the alleged statements by these state agents to defendants SAT and Secord. A litigant is entitled to have the jury instructed as to his claims and theories if they are legally correct and supported by the evidence. The agency instructions allowed the jury to consider the actions of Schofield and Abrams by

allowing the jury to consider whether "William Cooper or anyone acting for Corporate Air Services, Ltd. was an agent of the defendants." The instructions allowed the jury to consider the actions of Schofield and Abrams to the extent that the evidence permitted. If the jury accepted plaintiffs' claim that Corporate Air Services, Ltd. was a sham and only a front for the defendants, the jury could have found that Schofield and Abrams were acting for Corporate Air Services, Ltd. and thereby acting as agents for the defendants and the joint venture. There was no prejudicial error in regard to the court's instructions on agency. Finally, if any error occurred at all it was surely harmless.

(5) Parol Evidence

Plaintiffs also contend that the court erred in refusing to admit parol evidence that the Hasenfus and Sawyer written contracts were a sham and the phoney employment agreements were not binding contracts. This argument is misplaced; the court did not so limit the arguments precluding the plaintiffs from making the assertion that the written contracts were a sham. To the contrary, the court allowed plaintiffs to present all their evidence in this area. Plaintiffs were allowed despite various hearsay objections on the part of the defendants, to question the various witnesses about the written agreements. Although Piowaty and others testified at trial or through deposition testimony that they were not concerned about the terms of the written employment agreement beyond the fact that they understood that they were independent contractors, none of the witnesses testified that the written agreements were shams or not binding. Hasenfus himself testified that he signed the Independent Contractor Agreement which was introduced into evidence and conceded that he was in fact paid according to the written terms of the agreement.

In general it was evident that many of the witnesses admitted to signing the written agreements, but thought the contracts did not contain all the terms of the employment agreement. It became obvious early on in the trial that oral

modifications to an existing agreement or separate oral agreements were very important to the case. Therefore, the court was mindful of this during the trial and was sure to include the appropriate jury instructions. See pages seventeen and eighteen of the Court's Instructions to the Jury. The court never limited the plaintiffs in their arguments of such oral agreements or modifications; no error occurred.

(6) Obligations to pay after the October 5, 1986

Hasenfus identifed the Independent Contractor Agreement and admitted to signing the agreement acknowledging the terms of employment, salary and living expenses stated therein. Hasenfus acknowledged the type of services he was to perform in accordance with the agreement and admitted his inability to perform the services after the crash on October 5, 1986. Plaintiffs had no evidence of any oral agreement or modifications of any oral or written agreement which inferred that Hasenfus' pay was to continue if he was unable to perform as a kicker or if he was captured. Hasenfus himself did not testify to such an oral modification. It would have been error to allow plaintiffs to argue this obligation to pay after the crash occurred since there was absolutely no evidence from which a reasonable juror could find such obligation to pay. The court's decision to not hold defendants liable for any terms of the agreement after the crash was not prejudicial error.

DONE AND ORDERED at Miami, Florida, this 7th day of January, 1991.

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SENIOR UNITED STATES DISTRICT JUDGE

cc: Robert M. Beckman, Esq.
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